15738

No. 15378

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon.

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United States Attorney,
District of Oregon,
Attorney for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 12-9-58—45

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COMPILER'S NOTE

In references in this brief:

Testimony is cited as transcript or (Tr.).

Motions to dismiss and to suppress are cited as such or (M.S.).

Transcript of Record is cited as such or (Rec.).

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OPINION BELOW

The judgment of the court below was rendered without opinion upon the jury's verdict.

JURISDICTION

Jurisdiction of the District Court is conferred by 18 USC § 3231. Jurisdiction for review by this court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 37(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

By their appeal, appellants question the constitutionality of 47 USC § 605, the sufficiency of the indictment except as to the conspiracy count, Count I, the denial of a bill of particulars, the admissibility of evidence, the failure to suppress evidence, the sufficiency of the evidence, the denial of motions to dismiss, the instructions of the court, failure to use defendants' verdict forms, failure of the court to grant additional continuance and the court's use of language in instructions comparable to that used by government counsel in closing argument. Arising from these questions are two of primary interest and concern. They are (1) the availability to the government of evidence which may have been illegally seized by state officers without participation of federal officers, and (2) the power of the federal court to compel testimony from persons who have been enjoined by state court from giving testimony.

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES—ARTICLE VI, Clause 2—

> "*Supreme Law of Land*—This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

18 USC 371—

"Conspiracy to commit an offense or to defraud United States—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

28 USC § 2283—

"Stay of State court proceedings—
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

47 USC § 501—

General penalty—Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter

punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

47 USC § 605—

"*Unauthorized publication or use of communications*—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the

receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

FEDERAL RULES OF CRIMINAL PROCEDURE—Rule 26—

"*Evidence*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

The defendants were each convicted by jury trial of conspiracy to violate the federal wire tap statutes, and of six counts of substantive violation of the wire tap statutes.

The indictment charged and the evidence was that Elkins was Clark's employer during the period of the alleged violations (Rec. 11, Tr. 2127).

There was evidence that one Maloney was a tenant in Apt. 502, King Tower Apartments in Portland, Oregon during August, September and October 1955 and was there served by a telephone connected with an interstate telephone system (Tr. 2021); that said apartment had previously been rented by Bernard Kane (Tr. 1944-45); that Bernard Kane had rented Apt. 502

on behalf of Elkins (Tr. 2000); that Kane, at Elkins' request, in early August 1955, obtained occupancy of Apt. 503, which adjoined 502 by common wall (Tr. 2002-3). A hole was found in the common wall about the size of a pencil (Tr. 1947-48), and in another nearby wall inside Apt. 502 behind some removable kitchen cabinets, a hole had been scooped, with pin-size holes punched in the wallpaper on the livingroom wall at the location of this hole (Tr. 1947-49).

On May 17, 1956 the District Attorney of Multnomah County, Oregon executed an affidavit for a search warrant on information and belief that evidence of obscene pictures, sound recordings, etc. were on the premises where defendant Clark resided in Portland, Oregon. The night of May 17, 1956 state sheriff's officers executed the search warrant and seized from Clark's premises, among other things, five tape recordings (Tr. 578) (Received in ev. 1937) which contained recorded telephone conversations, some of which later became a basis of this proceeding. The tape recordings were on reels in boxes and in each box was a slip of paper with handwritten notations which were in the handwriting of defendant Clark (Tr. 1039). At the time of the search, evidence was that Clark, in response to the question, "Did you make these tapes for Elkins?" said, "Yes, I did and you know it and that's why you are here." (Tr. 582).

Also, Clark and Elkins, in the presence of a Mrs. Erickson (Tr. 2128) admitted recording conversations in Apt. 502, King Tower Apartments, by Clark, as Elkins' employee. On May 22, 1956, FBI agents were

invited to audit the tapes (Tr. 225), heard a portion thereof and the tapes were removed to the State Grand Jury, which on May 22, 1956 returned an indictment against these defendants (appellants herein) for violation of the Oregon wire tap statute.

The magistrate who had issued the search warrant ruled the search and seizure illegal on May 23, 1956, ordered certain contraband slot machines taken during the search destroyed and directed that the tapes in question be turned over to the sheriff for release upon the "direction of the Attorney General of the State of Oregon or such higher circuit or supreme court before whom the matter may be heard" (Rec. 65). On May 29, 1956, the sheriff delivered the tapes, etc. to the Attorney General of Oregon and the state police. The state police placed the articles in a bank deposit box from which they were obtained September 5, 1957 by the government by federal search warrant.

Federal indictment was returned February 4, 1957. The defendants were arraigned February 18, 1957 and a trial date of March 26, 1957 fixed.

The court granted a continuance on March 20, 1957 until April 16, 1957. Motions for bill of particulars, to dismiss and to suppress evidence and for further continuance were filed. After proceedings and testimony, these motions were overruled.

Early in the course of the trial, defendants brought proceedings in the state court to enjoin witnesses from testifying, many of whom had been called by defendants for testimony on the motion to suppress herein. Upon its

appearing that the federal court intended to compel testimony of such witnesses, defendants sought to arrest the trial by seeking a stay to allow petition for a writ of prohibition from the Court of Appeals, Ninth Circuit, Case No. Undocketed, decided April 22, 1957 as *"In re Petition of James Butler Elkins and Raymond Frederick Clark, Petitioners, for a stay to enable the filing of a Petition for Writ of Prohibition."* After denial of the Petition the trial proceeded. Those having possession and custody of the tapes, notes, etc. from the time of their discovery at Clark's residence until the trial, testified as to the identity and lack of alteration. The tapes were played audibly and witnesses were called who identified their own telephone conversations thereon and testified that they were unaware of the interception and recording thereof, that such was unauthorized, as was any divulgence or use thereof by the defendants. Three witnesses testified to divulgence or unauthorized use of various of the recorded conversations by the defendant Elkins. The defense rested at the close of the government's case.

The sentences were:

Elkins:	Count I	10 months imprisonment and fine of $1,000.
	Count II	Same as Count I, consecutive therewith.
	Count V Count VI Count VII Count VIII Count IX	6 months concurrently with each other and concurrent with period imposed for Counts I and II.

Total—20 months and $2,000.

Clark: Count I — 4 months imprisonment and $250 fine.

Count II — 60 days imprisonment consecutive with Count I and $250 fine.

Count V, Count VI, Count VII, Count VIII, Count IX — 60 days concurrent with each other and with imprisonment imposed for Count II.

Total—4 months and 60 days and $500 and costs.

Counts III and IV were withdrawn by the court.

Violation of 18 USC § 371, involving conspiracy to commit a misdemeanor, is punishable by a maximum of the penalty prescribed for the misdemeanor.

The conspiracy charged is violation of 47 USC §§ 501 and 605, punishable by a maximum of one year and/or $10,000 fine for first offense.

ARGUMENT

Appellants' opening brief is such a broadside attack on the entire proceedings that for clear discussion of the proceedings, appellee submits that initially the affirmative sufficiency thereof should be discussed, followed by particular treatment of appellants' points not covered in such discussion.

Appellee proposes to demonstrate:

I. 47 USC §§ 501 and 605 are constitutional.

II. The indictment was sufficient:

A. As to Appellant Elkins.

(1) Only Counts I and II need be sustained to support the sentence.

B. As to Appellant Clark's Special Objections.

(1) Only Counts I and II need be sustained to support the sentence.

III. The Court properly denied motions:

A. For suppression of evidence:

(1) The state search, even if illegal, was without participation by federal officers.

(2) *Rea v. U.S.* did not support the state court's injunction against witnesses herein.

(3) Appellant Elkins had no standing to object to the state search of Clark's premises.

(4) Appellants have no standing to object to the acquisition of the questioned evidence by the federal agents.

(5) Use of evidence does not depend on legality of federal search.

(6) Federal search was regular and valid.

B. for discovery;

C. for dismissal;

D. for bill of particulars;

E. for additional continuance;

F. for judgment of acquittal;

G. for new trial;

H. in arrest of judgment.

IV. The Court properly compelled testimony under state court restraining order.

V. The evidence was sufficient to support the verdict.

VI. The Court's instructions were not erroneous.

VII. The sentences were lawful and should be affirmed.

and conclude with the further topics:

VIII. Summary of discussion as related to appellants' Specifications of Error and treatment thereof not elsewhere discussed in Appellee's Brief.

IX. Comment on Appendix to Appellants' Brief.
On the Motion to Suppress.
On the Merits.

X. Appellants' paradoxical Position.

I. 47 USC §§ 501 AND 605 ARE CONSTITUTIONAL.

Appellants, in their Specification of Error No. 1(f), attack the constitutionality of §§ 501 and 605, Title 47, United States Code, arguing that § 605, which describes the proscribed conduct, is so vague as to not constitutionally charge an offense and because it may be interpreted to apply to intrastate telephone communications allegedly outside the power of Congress to regulate.

Appellee submits that while the statute covers broad fields of communications and ideally could have been more artistically drawn, there can be no doubt in a fair reading thereof that intercepting telephone messages and divulging the contents thereof, or the divulgence or use of messages known to have been so intercepted, violate the statute.

Constitutionality of the statute requires no more, even though strained semantics and tortured construction may demonstrate that certain conduct which might appear to come within the literal terms would so dilute the statute that to sustain it requires interpretation. The courts can make such interpretation without condemning the act. *Rathbun v. U.S.*, 355 U.S. 107(1957).

Interstate communications need not be involved. The evidence in this case is, however, that the lines to Maloney's apartment in King Tower Apartments were connected to interstate lines. *Weiss v. U.S.,* 308 U.S. 321 (1939); *U.S. v. Varlack,* 2 Cir. 1955, 225 F.2d 665; *Benanti v. U.S.,* 355 U.S. 96 (1957), all apply the statute to intrastate communications. The *Benanti* case states: "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Sec. 605, that portion of the statute pertinent to this case applies both to intrastate and interstate communications. *Weiss v. U.S.* * * * " The *Benanti* case held that § 605 preempted the field of protection of wire communications so fully that state constitutions could not lawfully provide for authorized wire taps. Such sweeping doctrine seems unlikely to be based upon a statute about the validity of which the court may have entertained any doubts.

The court in *Massicot v. U.S.,* 5 Cir. 1958, 254 F.2d 58 at 61, definitely held that the statute states a crime. See also, *U.S. v. Gris,* 2 Cir. 1957, 247 F.2d 860.

II. THE INDICTMENT WAS SUFFICIENT:

A. As to Appellant Elkins.

The conspiracy count, Count I, has not been challenged as to form.

Count II is challenged by Elkins by his assertions (Spec. of Error Nos. 1(b) and (e)) that the count fails to allege the date or dates upon which the divulgence or

use of the communication took place and that the count fails to allege a wilful or knowing divulgence or use by defendants.

Count II of the indictment charge reads:

> "That JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, the defendants above-named, on or about August 23, 1955 in the District of Oregon, did knowingly, wilfully and unlawfully, without authority of the senders thereof, intercept and record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC.)"

It is submitted that a fair reading of the charge establishes as on or about August 23, 1955 as the time of the alleged interception and divulgence, and that the clauses in the indictment as to interception and divulgence are both dependent upon and relate to the preceding language specifying that on or about August 23, 1955, they did the things charged, i.e., intercepted and divulged the communications. It is submitted that the repetition of the words "wilfully" and "unlawfully" before the description of the divulgence would have added nothing to the appellants' understanding of the offense. A reading of the statutes referred to required proof of wilful divulgence, the language fairly requires it, and the court by instructions required proof thereof.

No alibi was offered. An exact date of the divulgence need not be proven. Witnesses called in connection with divulgence placed such between late summer and October of 1955, the fall of 1955, or late October or early November 1955. The proven occasions of divulgence were proximate to the time charged, and before the return of the indictment, well within the period of limitations. See *Bold v. U.S.,* 9 Cir. 1920, 265 F. 581. Under such circumstances, the requirements of indictment and proof thereunder meet established standards of criminal practice and procedure.

As this court has said recently in *Stapleton v. U.S.,* 9 Cir. #15477, 10/22/58:

> "The general rules for determining the sufficiency of an indictment are well settled. Indictments are now immune from the technical challenges permitted at common law. They will be held sufficient if as a practical matter they state the elements of the offense clearly enough to enable the defense to prepare for trial and to plead a judgment in bar of a future prosecution for the same offense. Prejudice to the defendant is a controlling consideration. See *Hagner v. United States,* 285 U.S. 427 (1932); *Hopper v. United States,* 9 Cir. 1944, 142 F.2d 181; *Elwert v. United States,* 9 Cir. 1956, 231 F.2d 928.
>
> "Appellant suffered no prejudice in the preparation of his defense. Counsel for Stapleton, with commendable frankness, conceded that his preparation for trial had not been hindered by the omission of which he complains. Furthermore, the Government submitted evidence tending to prove lack of consent by the owners of the property, and the jury was instructed that such lack of consent was an essential element of the offense. The indictment is adequate to protect Stapleton from any further prosecution for the same offenses charged here. We conclude

that the alleged defect in the indictment did not prejudice Stapleton.

"However, Stapleton contends that, regardless of prejudice, an indictment which fails to allege all of the elements of the offense precisely and expressly cannot support a finding of guilty. This argument disregards the nature and function of the indictment under modern concepts of criminal procedure. An indictment is not required to set out all those elements of the offense which must be found by the jury before they may find the accused guilty. It is sufficient 'that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.' *Hagner v. United States,* supra, at Page 433. In other words, all the essential elements need not be stated directly if they are necessarily implied. *Hopper v. United States,* supra, at page 184. Nor need the indictment exclude all exceptional circumstances which might serve to take the alleged acts out of the criminal category. *Rose v. United States,* 9 Cir. 1945, 149 F.2d 755."

The count was sufficient to enable the defendant Elkins to prepare his defense and to prevent subsequent trial for an identical offense. The court required the government to elect particular conversations and acts of divulgence (Tr. 2460-66). Trial proceedings may bar subsequent proceedings on same facts, and overcome objection that an indictment does not protect a defendant against double jeopardy. As the court said in *Norris v. U.S.,* 5 Cir. 1946, 152 F.2d 808, at page 811:

"The function of a bill of particulars is to cure omissions of details that might enable the defendant to prepare his defense, and to protect him against a second prosecution for the same offense. In Tubbs v. United States, 8 Cir., 105 F. 59, 61, the court said:

> 'Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted for a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The supreme court has put a quietus on the stock objections by repeatedly pointing out that the defendant may apply for a bill of particulars * * *, and that parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal.'
>
> "See also Rosen v. United States, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L.Ed. 606; Durland v. United States, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709; Wharton's Criminal Pleading & Practice, Section 481; 2 Bishop's Criminal Procedure, Section 816."

Also see *Roberson v. U.S.,* 5 Cir. 1956, 237 F.2d 536, at page 537:

> "In passing on the objection that the indictment was in such indefinite terms that the accused could not plead an acquittal or conviction in bar of another prosecution, it must be borne in mind that, upon a plea of former jeopardy, the identity of the offenses may be established by other parts of the record or even by parol evidence."

Objections are made by appellant Elkins to Counts V through IX on these same grounds, which appear to require no additional discussion.

Appellant Elkins, however, claims that Counts V, VI, VII and VIII each charge two crimes and are therefore defective (Appellants' Spec. of Error 1 (d)).

That a statute may properly state different means of committing an offense, and the indictment allege the commission of the crime by those different means conjunctively, is established law. See *Johnson v. U.S.*, 5 Cir. 1953, 207 F.2d 413, at 319, 320.

> " * * * cases hold generally that if a statute denounces several things as a crime, or creates only one offense but states more than one way in which it may be committed, an indictment may, in a single count, charge violation of the statute in any or all of the ways stated therein, provided that the various ways by which the offense may be committed are alleged conjunctively rather than disjunctively, or alternatively. This rule, however, is not applicable to the present case, although it would not have been fatal to the indictment if the elements had been alleged conjunctively.
>
> " * * * Appellant's primary argument is predicated upon the contention that his defense was embarrassed by the use of the disjunctive 'or' rather than the conjunctive 'and' which he claims necessitated his preparing three different defenses to the single count of the indictment. Obviously, he would have been in no different position if the conjunctive had been used, since proof of his knowledge that the jewelry had either been stolen, converted or taken by fraud at the time he transported it would sustain a conviction. There can be no valid contention that appellant's defense was embarrassed or that he was surprised by the evidence offered against him at the trial merely because the indictment alleged the prohibitive character of the goods in the disjunctive rather than in the conjunctive. The indictment did not charge appellant in the alternative with having committed one or another of several offenses. He was charged with only one offense."

Appellant complains of a mixture of clauses of the

statute in the indictment. At most, the indictment alleges different means of committing an offense against a wire communication, as does the statute.

(1) Sustaining Counts I and II of the seven upon which he was convicted will support the sentence and judgment as to appellant Elkins. *Simpson v. U.S.*, 9 Cir. 1957, 241 F.2d 222, reversed on other grounds, 355 U.S. 7 (1957).

B. As to Appellant Clark's Special Objections.

Appellant Clark joins Elkins in challenging Counts II through IX concerning the assertions as to the alleged omissions of dates of divulgence and wilful and knowing divulgence or use. He also objects to Counts V, VI, VII and VIII as applied to him, alleging that the acts of divulgence or use described are not attributed to Clark. These counts were submitted to the jury on the theory that under the charge the jury could find that as to these counts, Clark aided and abetted Elkins and could therefore be found a principal.

It is well to note that these defendants are both charged in Count I of the same indictment with conspiracy and that each of the substantive counts are alleged as overt acts in furtherance of the conspiracy. The counts could not have been challenged on this ground had the pleading included Clark's name as having actually divulged (although proof would show Elkins the actor) or with having aided and abetted Elkins in the divulgence (by the interception and recording).

Reading the indictment as a whole, the count fairly apprises Clark that he is charged in concert with Elkins in the scheme to intercept and divulge and with the accomplishment of the fruits of the scheme in a manner supportive of the substantive counts charging both defendants. That two persons do different acts in the accomplishment of a crime requiring both will not prevent their joint activity from being criminal as to each. *Russell v. U.S.*, 5 Cir. 1955, 222 F.2d 197.

(1) However, Clark raises these objections only as to Counts V, VI, VII and VIII. Clark's other objections are answered by discussion of Elkins' objections in the preceding sub-topic. Affirmance of Count I and Count II will support the judgment and sentence.

III. THE COURT PROPERLY DENIED DEFENDANTS' MOTIONS:

A. for suppression of evidence.

(1) *The state search, even if illegal, was without participation by federal officers.*

Appellants, in their Specification of Error Nos. 2,(3) and (4), contend that any illegality in the state search and seizure should prevent its use, contending that the state officers' search was predicated on no desire to enforce state law, but had as its sole object federal prosecution, and that common practice of federal-state police agency official cooperation made the state search binding on the federal officials and the evidence inadmissible.

The refutation of the first assertion is the return of a state indictment for violation of the Oregon wire

tap law on May 22, 1956, five days following the execution of the search warrant, and the uncontroverted testimony. Counsel suggests that the *Benanti* case, *supra,* decided more than two years after the search and holding that state provisions conditionally authorizing wire tapping are counter to 47 USC § 605 and therefore in conflict with a supreme federal law and invalid legislation, should require the finding that the state officers intended no state prosecution in connection with the search. Such reasoning is highly specious. Cf. *People v. Grant,* N.Y. Ct.Gen.Sess., NY Cty 11/7/58, 27 L.W. 2243, 11/25/58. It is further to be recalled that the search warrant was concerned with obscene photos and records—not evidence of wire tap violation, state or federal. The record contains no support for appellants' position.

Appellants attempt to torture acts of ordinary courtesy after all evidence has been gathered up by state officials into such "federal cooperation" as will taint the evidence with illegality in federal court.

The evidence is clear and uncontroverted in this case that the federal officials had no prior knowledge of the intended search, did not participate in, nor join it. General harmony among police agencies in furtherance of the constant effort to suppress crime must exist for the good of all. *Andersen v. U.S.,* 9 Cir. 1956, 237 F.2d 118. That it does is all that the testimony herein showed. Such cooperation is not the tainting circumstance of *Gambino v. U.S.,* 275 U.S. 310 (1927), in which case the search was by New York officers for prohibition

violations, New York having *no* prohibition law, or *Byars v. U.S.,* 273 U.S. 28 (1927), in which the federal alcohol tax agent actually accompanied the state officers in the execution of their search warrant and physically partcipated in the search.

Appellants, by pursuing forcefully this contention, detract from their further argument that if the state search was illegal, it is thereby inadmissible in a federal prosecution even without federal participation or common practice or state search with intended federal use only. *Hamer v. U.S.,* 9 Cir. 1958, 259 F.2d 274.

This circuit has recently reiterated the doctrine that federal prosecution may be based on evidence illegally obtained by state officers absent federal participation. *Rios v. U.S.,* 9 Cir. 1958, 256 F.2d 173; *Symons v. U.S.,* 9 Cir. 1949, 178 F.2d 615.

Appellants urge this court to repudiate its steady position on this question, citing the decision of *Hanna v. U.S.,* D.C. Cir. #14462, 10/2/58. The *Hanna* case reaches its conclusion by speculating on possible future action of the Supreme Court. It rests in part on a bit of footnote dictum in *Benanti v. U.S., supra,* suggesting that the use of such evidence in federal courts has remained an open question in the Supreme Court.

Appellee must respectfully disagree that such question has remained an open one in the Supreme Court. Such a statement ignores too much of what the Supreme Court has said before. The overwhelming weight of the various circuits' decisions requires admission of such evidence.

Historically, the United States Supreme Court held in *Weeks v. U.S.*, 232 U.S. 383 (1914), that evidence obtained by an illegal search and seizure by federal officers was subject to suppression and inadmissible in a federal court. However, in that same case, the court held that evidence obtained by state officers not acting under federal authority was admissible in a federal trial and that the 4th Amendment did not require exclusion on the basis of the state action and did not apply to state action. In *Byars v. U.S., supra,* the court did not question the right of federal authorities to use evidence improperly seized by state officers operating independently and said nothing in regard to the application of the 4th Amendment as applied to state action. Against this background, the Supreme Court decided *Wolf v. Colorado,* 338 U.S. 25 (1949), which is principally relied upon by the court in the *Hanna* case, *supra. Wolf v. Colorado, supra,* and *Irvine v. California,* 347 U.S. 128 (1954), hold that the 4th Amendment is applicable to state action through the due process clause of the 14th Amendment, but that the 4th Amendment does not thereby require state courts to adopt the federal rules of exclusion, but that the states may provide other remedies for invasion of constitutional rights. In *Hanna,* the court reasoned that the *Wolf* decision holding that the 4th Amendment is applicable to action by state officers, changed the basis upon which the *Weeks* case held that evidence illegally obtained by state officers was admissible in federal courts. It is submitted that this conclusion is erroneous in the light of *Lustig v. U.S.*, 338 U.S. 74 (1949). The *Lustig* case was decided

on the same day that the *Wolf* decision was announced. The opinion of Justice Frankfurter went to great lengths in pointing out that is his view there was federal participation in the search, thus rendering inadmissible the evidence so obtained. However, relying on the *Byars* case as his authority, he at page 79 carefully preserved the "silver platter doctrine." It would not have been necessary to do this or to establish federal participation if the Justice believed, and those joining with him believed, that evidence obtained illegally by state officers was inadmissible in federal trials under the *Wolf* decision. If the evidence be inadmissible merely because of an illegal search by state officers, there is no need to examine further the question of federal participation. The footnote mentioned in the *Benanti* case, *supra,* seems to disregard the "silver platter doctrine" expressed in *Byars v. U.S.* and *Lustig v. U.S., supra.*

The *Hanna* case apparently overlooks the fact that in the *Wolf* case the Supreme Court paid great respect to Justice Cardoza's opinion in *People v. Defore,* 150 NE 585, N.Y. (1926). In his often-cited opinion, Justice Cardoza rejected suppression on policy grounds in the face of a state statute forbidding unreasonable searches and seizures. Thus, contemporaneous application by the Supreme Court of the *Weeks* case, did not lose sight of the fact, as exemplified in the Appendix to the *Wolf* opinion, that unreasonable searches and seizures were sanctioned in some form at least in the states insofar as evidence was concerned at the time of *Weeks.* The Supreme Court was aware in the *Wolf* case of the seriousness of "overriding relevant rules of evidence."

It did not overlook Justice Cardoza's concern with the "social need that crime should be suppressed." Recently, the Supreme Court of the United States denied certiorari in the case of *Gaitan v. U.S.,* 356 U.S. 937 (1958). The *Gaitan* case sought certiorari of a decision of the 10th Circuit permitting evidence of marihuana illegally seized by state officers in a federal trial, 10 Cir. 1958, 252 F.2d 256. Since the *Lustig* case, as before, the "silver platter doctrine" has been accepted as controlling in numerous decisions of the Courts of Appeals. *Losieau v. U.S.,* 8 Cir. 1949, 177 F.2d 919 at 923; *Parker v. U.S.,* 9 Cir. 1950, 183 F.2d 268 at 270; *Fredericks v. U.S.,* 5 Cir. 1953, 208 F.2d 712 at 714, cert. den. 347 U.S. 1019 (1954); *U.S. v. Stirsman,* 7 Cir. 1954, 212 F.2d 900 at 905; *Jones v. U.S.,* 8 Cir. 1954, 217 F.2d 381; *U. S. v. White,* 7 Cir. 1956, 228 F.2d 832 at 835; *Collins v. U.S.,* 6 Cir. 1956, 230 F.2d 424. See also, *Costello v. U.S.,* 8 Cir. 1958, 255 F.2d 389, cert. den. 10/13/58.

Sound reasoning supports the rule of the "silver platter doctrine." Federal courts are not concerned with disciplining or correcting state officers. The exclusion of such evidence in federal trials would not effectively curb state officers bent on procuring evidence of a state violation, which evidence, through the processes of law enforcement, may ultimately find use in a federal prosecution. Adoption of a rule requiring federal courts to consider the legality, under federal 4th Amendment standards, of a search by state officers, would put a pointless burden on the federal courts, which only adopted an exclusionary rule in 1914 by *Weeks v. U.S., supra.* To require federal courts to be either bound by

state court findings of an illegal search or to apply state standards of admissibility would be opening the door to as many rules of suppression as there are states. It would invite unseemly and pointlessly conflicting rulings between state and federal courts on the same facts. It would allow the states to determine what evidence is admissible in the federal courts. This cannot be. It is for the federal court to decide what evidence is admissible at a federal trial. *Wolfle v. U.S.*, 291 U.S. 7 (1934); *Serio v. U.S.*, 5 Cir. 1953, 203 F.2d 576, cert. den. 346 U.S. 887 (1953). To allow state decisions and law to so apply would be disruptive of a uniform system of federal criminal law and procedure.

As is pointed out in 18 USCA, Federal Rules of Criminal Procedure, Rule 26, at page 255—"Notes of Advisory Committee on Rules":

> "2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, rule 43(a), 28 U.S.C.A.), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another."

It may be suggested that federal courts might apply only federal standards to the search and disregard who made the search. Jealous regard for our constitutional liberties does not require such doctrine for the protection of our liberties. Federal prosecutions should not be frustrated by the acts of those not part of or under control of the federal executive or courts. Wrongful action by others should not be a basis of virtual immunity from federal prosecution absent fault of federal officers.

The Constitution does not require exclusion of the evidence. The exclusionary rule is not a universal one in the states and has only been the law in the federal courts since 1914, and then only as a means of discouraging federal officers from unreasonable searches. (For summary, see Appendix to *Lustig v. U.S., supra*). As was pointed out in *Wolf v. Colorado, supra,* other sanctions are within the powers of the states.

Because it is not the function of the federal courts to discipline state officers, a disregard of who made the search and application of the court's notions of reasonableness subjectively from the standpoint of the party offended by the search, does violence to the reason of the *Weeks* rule. Extension of such doctrine would even deprive the government of the benefits of evidence procured by overzealous acts of private persons or evidence gathered by police of another nation and delivered to government authority. The Constitution is not designed to conceal or suppress evidence of crime nor to aid the criminal. Protection of safeguards for the

innocent unavoidably often works to the advantage of the criminal. The rule of suppression recognized the practical limitations of sanctions available against federal officers who invaded private rights by search and seizure and sought to discourage them by making the fruits of such activity unavailable. The doctrine should not be extended.

Application of federal standards to a state search may require on occasion the determination of state law of arrest to which a search was incident, but in the case of a search warrant drawn under and conforming to state law but not satisfying federal law, application of such standards as a rule of evidence might subject the search to a standard different from that under which it was issued.

(2) *Rea v. U.S. did not support the state court's injunction against witnesses herein.*

It is suggested that because the state court here enjoined witnesses from testifying, as did the federal court in *Rea v. U.S.*, 350 U.S. 214 (1956), such testimony should not have been compelled. *Rios v. U.S., supra,* by footnote dictum, reserves this situation as an open question.

If the state court should not be entitled to determine what evidence is admissible in a federal trial (see Point III-A(1) herein), the method by which the state court seeks to accomplish such improper purpose should be immaterial. The drastic doctrine of the *Rea* case was limited, appellee submits, to its particular facts in which the federal agent sought to "flout [the standards for

searches and seizures] and use the fruits of his unlawful act either in federal or state proceedings." (page 218). The ruling had the effect, however, of telling a state what evidence it could use, at least under these circumstances, in a state prosecution. The fact that such action could be taken should be limited to the facts of that case, but in itself attests to the supremacy of the federal law on those unhappy occasions when federal and state laws collide. See *Benanti v. U.S., supra; Cooper v. Aaron,* No. 1, Aug. Spec. term, 1958, US Sup. Ct. Op. 9/29/58, at page 15.

Because the Supreme Court saw fit to declare that federal officers might be enjoined from testifying in state courts does not enable state courts to do likewise to the frustration of the federal courts. The federal courts are empowered by statute, 28 USC § 2283, the supreme law of the land binding on state courts, to effectuate their jurisdiction, by injunction, if necessary. State conflict with this principle cannot be, although the courts, both state and federal, should be and usually are hard-bound by restraint and comity under a dual system to prevent unseemly conflict.

As the court said in *Riggs v. Johnson County,* 73 U.S. 166 (1867) at 195:

> "The Constitution itself becomes a mockery, say the court, in that case [U.S. v. Peters, 5 Cranch 136] if the State legislatures may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals [citing cases].

* * * *

> "State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and State courts act separably and independently of each other and in their respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye'.
>
> "Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit courts are wholly independent of State tribunals."

Rule 26, Federal Rules of Criminal Procedure, would likewise seem to preclude the application of the *Rea* doctrine in reverse.

Should the court conclude that the *Rea* case is basis for a state court to, under like circumstances as to state officers, enjoin state officers from appearing to give testimony in federal court, it is submitted that the facts in the *Rea* case are definitely distinguishable from the instant case.

In the *Rea* case, the federal officer had conducted a search and seizure found illegal by the federal court in a federal prosecution. The officer thereupon carried the same evidence to the state and was the complainant to initiate the state court proceedings.

The Supreme Court extended the rule of *McNabb v. U.S.*, 318 U.S. 332 (1943) to supervise and restrict the

conduct of the federal officer characterized as flouting the federal requirements of search and seizure.

Herein, the state officers were not the moving parties to the federal action, which was initiated by grand jury indictment. The injunction herein was applicable not only to the officials who had signed the affidavit supporting the search warrant or executed the search, but to numerous others whose contact with the evidence was incidental after the search had been fully accomplished. Appellee has already discussed the problems facing a holding that would entitle state courts to take such action, even though, under *Rea,* federal courts under certain conditions may. See also, *Chicago, M. & St.P. Ry Co. v. Schendel,* 8 Cir. 1923, 292 F. 326, at page 329. The court reasoned:

> "If witnesses, by order of a state court can be prevented from testifying in a federal court, then the federal court is a mere shell, to be crushed by the pressure of a state court injunction."

(3) *Appellant Elkins had no standing to object to the state search of Clark's premises.*

As the court said in *U.S. v. Wexler et al,* S.D. N.Y. (1925), 4 F.2d 391, at page 392:

> "Assuming the view most favorable to the petitioner from the record, the principles to be applied to the case are, in substance, these: (a) A defendant, whose person, house, or papers and effects have been the subject of unreasonable searches and seizures, in violation of the protection of the Fourth Amendment of the Constitution, will be heard to complain. (b) If the house or premises of a codefendant or co-conspirator are unreasonably searched without a proper search warrant, or pursuant to a

> defective one, and property seized, he alone whose house has been so unreasonably and illegally searched will be heard to complain thereof. The evidence, if any, so obtained is, however, admissible against all other defendants.
>
> "In the case of Lusco v. U.S. (C.C.A.) 287 F. 69, the indictment charged Lusco, together with one Ganci, with unlawfully selling narcotics. The narcotics in question were seized in Ganci's apartment without a search warrant. Both defendants were convicted. It was held that the illegal search and seizure of the property in Ganci's residence was in violation of his rights, but as to his co-defendant Lusco, even if the question had been seasonably raised, 'it would be of no service to defendant [Lusco]. The protection of the fourth amendment safeguarded Ganci, but the illegal search and seizure as against Ganci cannot be availed of by Lusco.' See, also, Remus v. U.S. (C.C.A.) 291 F. 501. Other cases might be cited to sustain the principle set forth, but it cannot be doubted that these cases set forth the law."

Elkins only indirectly asserted ownership of the evidence involved through his counsel's affidavit on the motion to suppress in federal court.

In the state court proceeding on the state wire tap indictment, subsequent to the evidence's being acquired by the federal search warrant, the state circuit court ruled that the state search was illegal but did not suppress the evidence and purported to turn that which the court did not have and did not seek to obtain, over to the Attorney General of Oregon (Rec. 68).

The search at Clark's premises did not offend the rights of Elkins. He could not and cannot complain thereof, even should Clark be entitled to in the proper forum.

At the jury trial of the within cause, neither appellant claimed the property and a very substantial portion of defendants' examination of government witnesses was calculated to cause the court and jury to conclude that the tape recordings offered were not the same or not in the same condition as those taken from the Clark premises. At the time of the initial offer of the tapes as evidence of *corpus delicti,* appellants did allude to the fact that the evidence had been suppressed by the state court (Tr. 167), but by the exhaustive questioning of identity during the trial and upon offer as evidence, took a position completely inconsistent with that on their motion to suppress (Tr. 1902-1936).

The appellants seem to be urging at trial that these are not the tapes taken, but some illegally were which should require the suppression of these.

The jury found the consistent position of the government basis for its verdict.

See *Haywood v. U.S.,* 7 Cir. 1920, 268 F. 795, at 802 et seq.

(4) *Appellants have no standing to object to the acquisition of the questioned evidence by the federal agents.*

No premises of either of the defendants were intruded upon by the federal taking, which was from a bank. The evidence had been placed in the bank by the state police officers, who had in turn received it from the State Attorney General, who had in turn received it from the sheriff, with whom it had been placed by the

magistrate after his ruling that the state search was illegal and the evidence suppressed.

The state magistrate suppressed the evidence, but instead of returning it to the owners, caused it to be at large insofar as these appellants are concerned. No problem of *custodia legis* is presented by the state court's action because the state, by suppressing the evidence, had spent state use thereof. *Custodia legis,* in its application as between state and federal courts, is a rule of comity and is not applicable under the theory of the appellants, because the rule of *custodia legis* depends upon a valid seizure or custody of the res. *Fountain v. 624 Pieces of Timber,* S.D. Ala (1904), 140 F. 381; *The Bessie Mac,* W.D. Wash. N.D. (1937), 21 F. Supp. 220, at 223. The state, having ruled its process invalid, had no further claim for retention of the property.

The requirement that a state first having jurisdiction over a *res* may exhaust its use thereof is discussed in *Taylor v. Taintor,* 83 U.S. (16 Wall) 366 (1872), in which the court said, at 370:

> "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, *until its duty is fully performed and the jurisdiction invoked is exhausted*: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is unless there is some provision to the contrary —exclusive in effect *until it has wrought its function.*" (Emphasis supplied)

and by *Buck v. Colbath,* 70 U.S. (3 Wall.) 334 (1865), in which the language of the court is, at 342:

> "It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions."

Herein, when the state magistrate had ruled the search and seizure invalid, he had exhausted the state's jurisdiction. A contrary rule would permit a court of one system to make permanently unavailable to the other the subject matter of a controversy appropriately in the jurisdiction of the other by the simple act of a continuing claim after its judicial use therefor had ended. Such is not the comity appropriate to a dual system striving to avoid unseemly conflict. The taking of the evidence by the federal agents on process of the United States Commissioner did not, under the circumstances, work any interference with any lawful state court custody.

The taking of the evidence from the bank, whether by consent of the bank officials, the state officers holding the keys to the deposit box or by federal search warrant, did not entitle appellants to complain, or to suppression

thereof. The search and seizure of the bank was not unreasonable as to appellants. Appellants had not pressed for return of the property from the state court or officers after suppression between May and September. As the Supreme Court stated in *Goldstein v. U.S.*, 316 U.S. 114 (1942), at 121:

> " * * * the federal courts * * * with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized."

The court, in Note 12 of the opinion, adds:

> "The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts."

See also, *U.S. v. Nagle,* N.D. N.Y. (1929), 34 F.2d 952, at 958. As Judge Learned Hand said in *Connolly v. Medalie,* 2 Cir. 1932, 58 F.2d 629:

> "Men may wince at admitting that they were the owners, or in possession of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

See also, *Nielson v. U.S.,* 9 Cir. 1928, 24 F.2d 802.

(5) *Use of evidence does not depend on legality of federal search.*

Because the federal search of the bank and seizure invaded no right of the appellants on the record herein,

the use thereof in their prosecution does not depend upon the legality of the search. *Goldstein v. U.S.; Connolly v. Medalie; Nielson v. U.S.; supra.*

Certainly the appellants would have no more cause to complain against the use of the evidence because it was obtained by federal process, even if defective, from the possession of officials who could have without prejudice to the rights of the appellants delivered the evidence to the United States "on a silver platter."

(6) *The federal search was regular and valid.*

The search warrant was valid upon its face. The determination by the Commissioner in issuing a warrant to search premises for evidence of crime that probable cause for the search was established is conclusive unless the Commissioner's exercise of judgment was arbitrary or erroneous. *Dixon v. U.S.,* 5 Cir. 1954, 211 F.2d 547.

The law does not require as a showing of probable cause for issuance of a search warrant, that there be legal evidence sufficient for conviction. *U.S. v. Bell,* D.C. D.C. (1955), 126 F.Supp. 612; 17 F.R.D. 13; *Brinegar v. U.S.,* 338 U.S. 160 (1949), Note at 174, 175; *U.S. v. Klapholz,* S.D. N.Y. (1955), 17 F.R.D. 18; *Giacona v. U.S.* 5 Cir. 1958, 257 F.2d 450.

The finding of probable cause by the Commissioner was not arbitrary or erroneous. The affidavit of Mr. Sherk, the FBI agent, stated that as a fact *he had heard recordings* of telephone conversations intercepted and designed or intended for the use or benefit of a person or persons not entitled thereto, in violation of 47 USC

§ 605. He positively stated the location thereof and described the premises to be searched and the properties sought.

Appellants complain (Spec. of Error No. 2—1) that the search warrant was illegal because evidence on the motion to suppress showed that on May 22, 1956, Mr. Sherk listened to only one of the five tapes. Such objection is not valid if what he heard was evidence of crime. Such "sampling" may be compared to the revenue agent who tastes but one of several like-appearing jugs and detects whisky. Appellants also assert that Mr. Sherk had no knowledge of the means of the interception. Knowledge of the manner of interception, at this stage of the proceedings, in fact at any, was immaterial.

It is also complained that the affiant had no knowledge that parties to the conversations had not consented thereto. This was not the basis of the affidavit and warrant, although Mr. Sherk explained to the court that some of the parties had publicly claimed unauthorized interception. The basis of the warrant was that the recordings were intended for the use and benefit of persons not entitled thereto. Sufficient public claims had been made by some of the later witnesses at the trial and the motion to suppress to entitle Mr. Sherk, acting as a reasonable, prudent officer, to have such information. Neither Mr. Sherk nor the Commissioner was living in a vacuum.

Considerable time (3½ months) elapsed between the hearing of the tapes and the affidavit. However, that

does not alter the sound basis for belief that the tapes were the same and in the same condition. The tapes were not subject to consumption, as was the liquor in *Dandrea v. U.S.,* 8 Cir. 1925, 7 F.2d 861; *U.S. v. Dziadus,* D.C. W.Va. (1923), 289 F. 837 and *U.S. v. Nichols,* D.C. Ark. (1950), 89 F.Supp. 953, cited by appellants. In those cases, traffic in or manufacture of illicit liquor in the past were the subject of a present affidavit, without corroboration, and the searches intended to result in a finding of continued illicit activity not of the past act but of new, repeated violations. In the instant case, the time elapsed would not, under the circumstances of the intervening custody of the tapes, known to the affiant, cause his affidavit, made about three weeks after he had last seen them (Tr. 185), unreasonable. Appellants complain that Mr. Sherk could not identify the tapes because he had not marked them until after seizure. Marking is only one method of identity. Similarity of appearance with the like slips of paper certainly gave the agent reasonable basis for belief, together with his investigative contact, to entitle his reasonable and true belief that these were the same tapes. *U.S. v. Daniels,* D.C. N.J. (1950), 10 F.R.D. 225.

B. for discovery.

The appellants moved, on March 19, 1957, for permission to inspect and copy the tape recordings and wire recordings obtained by the government by seizure or other process.

This was permitted by the court before taking of evidence before the jury was commenced, and as soon

as appellants expressed desire therefor. The government did not resist inspection (M.S. 532-33).

Appellants had copies of the tapes from before the taking of testimony before the jury during the several weeks of trial, from April 16 to May 11, 1957, and rested at the close of the government's case. They did not press for earlier inspection. In these matters the trial court has discretion. No error was involved, and no injury to the appellants resulted from the time and nature of inspection asked for by appellants, not resisted by the government, and permitted by the court.

C. for dismissal.

The two dismissal motions are based upon the asserted insufficiency of the indictment (heretofore fully discussed under Point II) and the constitutionality of 47 USC § 605 (heretofore discussed in Point I). The above discussions of these points are referred to and incorporated for treatment of these motions.

D. for bill of particulars.

Appellants' motion to dismiss contained an alternative request for a bill of particulars indicating "the dates of the alleged divulgence or alleged use, or both, upon which [the government] intends to rely at the time of trial," and indicating the "manner of the alleged 'use and benefit' upon which [the government] intends to rely at the time of the trial."

The court rendered a written opinion denying the motions to dismiss and for bill of particulars. The court properly ruled that:

> "* * * a reading of the Counts II thru VIII * * * that the plaintiff alleges that the 'interception' or 'receiving' and 'use' or 'divulgence' are alleged in the conjunctive as occurring on or about a date specifically named in the count. Any question of an election by the government as to one of several dates as developed by the evidence is reserved until time of trial." (Rec. 74).

The court denied the request for a bill of particulars as to the manner of the alleged "use and benefit."

This portion of the request for bill of particulars would only seek the government's evidence and is not necessary for the preparation of defense or to prevent subsequent prosecution on the same facts and charge.

The indictment in the case of *U.S. v. Gris, supra* (Cr. # 150-241, S.D. N.Y.), charged conspiracy in Count I, and in Count II charged:

> "From in or about April, 1953, through April, 1954, in the Southern District of New York, the defendant Charles V. Gris, being then and there a person not authorized by the senders, did unlawfully, wilfully and knowingly intercept and cause to be intercepted wire communications to and from one Sally Fain at the Oliver Cromwell Hotel, 12 West 72nd Street, New York, New York, and did divulge and publish and cause to be divulged and published the existence, contents, substance, purport, effect and meaning of such intercepted communications to Bernard Spindel, Richard Chambers Rutherford, Louis Randell, Sammy Fain, Mary Grasso, and to other persons to this Grand Jury unknown. (Title 47, Sections 501 and 605, Title 18, Section 2, United States Code)."

In the conspiracy count, times of playing the recordings were set out in overt acts as was done herein (Rec. 12, *et seq*).

The defendant, Gris, moved for a bill of particulars. It was denied, Judge Frederick van Pelt Bryant stating in his opinion, N.Y. (1956) 146 F. Supp. 293, at 296:

> "As I have already mentioned, the indictment in this case is clear and specific. Its allegations are fully sufficient to inform the defendant of the crime charged, the times involved, the places where the alleged offenses were committed and the persons with whom the defendant conspired to commit them.
>
> "The defendant's 18 separate requests for particulars all call for details of the alleged crime. It is plain from the minutia of detail requested that the purpose of this motion is to require the government to present its evidence in advance of trial. This will not be permitted.
>
> "Each of the defendant's three motions is denied in all respects."

The indictment against appellants follows substantially the form of the *Gris* indictment. It is not appropriate that the government be limited in proof of a crime which may be committed by alternate means which may be alleged conjunctively. Proof of one means is sufficient.

The request for dates of the alleged divulgence or use ignores the plain description thereof in the overt acts listed in the conspiracy count to which a bill of particulars could have added nothing. (See overt acts 5, 6 and 7, Count I) (Rec. 13, 14).

E. for additional continuance.

The court did not abuse its discretion in denying further continuance.

The indictment was returned February 4, 1957. The appellants posted bail on February 6, 1957. They were arraigned on February 18, 1957 (Rec. 22), entered pleas of not guilty and were allowed until March 18, 1957 in which to move against the indictment.

On March 2, 1957, the court fixed a trial date of March 26, 1957.

On March 18, 1957, appellants sought a 90-day continuance, alleging that additional time was needed to prepare because appellant Elkins had retained new counsel on March 11, 1957 and because of widespread publicity concerning appellants. The trial was thereupon reset on March 20 to begin April 16, 1957. On April 13, 1957, Elkins, having again retained new counsel (although his previous counsel remained in the case for his codefendant with no conflict of interest) moved for further continuance. Clark also sought further continuance at the same time.

Elkins' shifting of counsel was of his own making. The court, having granted one continuance, did not abuse its discretion in granting further continuance. *Baker v. U.S.*, 9 Cir. #15762, 5/6/58.

Appellants contend that the case was highly complex and required more preparation time than was available to defendants. It is submitted that the role of the prosecution was not less laborious.

Actually, apart from questions surrounding the admissibility of evidence, primarily legal and not deserving of extended conference between lawyer and client and

basically disposed of by the ruling of the court previous to the last motion for continuance at the time of the motion to suppress, a simple, factual question was presented as to whether or not the recordings were of intercepted telephone communications without consent of the senders and the connection of the defendants with the interception and divulgence alleged.

Certainly, from February 18 until April 16 was adequate time to prepare defense to such charges, even considering some other distractions involving defendants, themselves.

As to much shorter time for preparation, see *U.S. v. Yager,* 7 Cir. 1955, 220 F.2d 795, cert. den. 349 U.S. 963 (1955).

That the matter of continuance is within the sound discretion of the trial court is established. *U.S. v. Mathison,* 7 Cir. 1956, 239 F.2d 358.

The publicity herein was not such as would necessarily be adverse to appellants. The Senate hearings and publicity therefrom tended to place them in generally favorable light. There was no situation presented as that in which the defendant and his office were pilloried by the legislative arm as in *Delaney v. U.S.,* 1 Cir. 1952, 199 F.2d 107, relied on by appellants.

The court carefully examined the jury on *voir dire,* allowed further *voir dire* examination directly by counsel, the appellants did not exhaust their preemptory challenges and the court did not refuse to excuse any juror challenged for cause. *Hamer v. U.S., supra; Graham v. U.S.,* 6 Cir. 1958, 257 F.2d 724 at 729.

During the trial, the jury was sealed and isolated from news affecting the trial or appellants.

U.S. v. Lebron, 2 Cir. 1955, 222 F.2d 531, cert. den. 350 U.S. 876 (1955); *U.S. v. Hoffa,* S.D. N.Y. (1957), 156 F. Supp. 495.

F. for judgment of acquittal.

Appellants sought acquittal at the close of the government's case and after verdict, challenging the evidence produced of "interception" and the definition of "interception" by the court, and the receipt of the recordings which were offered as evidence of "interception".

The court properly overruled the motions for acquittal.

The tapes were connected with defendant Clark by tracing them to his possession at his premises, and notes in the containers in his handwriting. The witness Kane established that Elkins had one time occupied Apt. 502, occasionally rented under Kane's name but paid for by Elkins, and that Kane, during the period which the testimony showed Maloney occupied 502, rented 503 for Elkins in Kane's name, but did not use it himself. The witness Carter found a hole in the wall leading between the two apartments and another hole and punched wallpaper in 502. The witness Erickson related statements which she took from Elkins and Clark as a stenographer or scrivener under a circumstance that communications by Elkins and Clark heard by her were not confidential communications or otherwise subject to exclusion as evidence under Federal Rules of Criminal Procedure 26, and the statements connected the appel-

lants with recordings related to Apt. 502 (Tr. 2059) and King Tower Apartments (Tr. 2067), the relationship between Elkins and Clark (Tr. 2084-91). The jury received such evidence, which tended also to link the appellants with recordings of telephone conversations, albeit stating circumstances intended to be exculpatory (Tr. 2127 et seq). The recordings themselves were as clearly "speaking exhibits" in that they spoke for themselves as evidence of the "interception". The jury was entitled as reasonable men and women to rely on common knowledge and experience in evaluating the sounds thereon, which included room noises abruptly ended and clear voices of both speakers to an obvious telephone conversation, the sounds of telephone buzzes, operators working calls, etc. The exact means of interception was not shown. It is submitted that proof of such detail was not required.

The court's instruction concerning interception was a fair definition thereof, and it is respectfully submitted that explicit instruction as to what constitutes interception should not be required under the concept that it is a word of common meaning and common understanding and used in the statute to denote proscribed activity which constituted an invasion of the means of communication which the statute sought to protect.

Appellee submits that the statute proscribes the surreptitious acquisition of messages from telephone lines (interception) and divulgence thereof, or divulgence or use of known intercepted messages.

As is pointed out in Footnote 5 to *U.S. v. Hill,* S.D. N.Y. (1957), 149 F. Supp. 83, at 85:

> "When one considers that the electrical impulse of a telephone message travels at the speed of light or 186,000 miles per second, the fallacy of the time factor as the determinant becomes apparent. In any event nothing in § 605 or its history indicates that Congress intended the time factor as a test in determining whether an interception occurred."

The decision seems in conflict with the later decision of the Supreme Court in *Rathbun v. U.S., supra,* only as to use of extensions with consent of one of the parties to the conversation. Herein, each party to the conversations testified as to the identity of the conversations and as to the total lack of knowledge of and consent to the interceptions or recordings.

The instructions of the court must be considered as a whole. A fair evaluation of the instructions could leave no other impression in the minds of jurors that "in order to constitute the interception of a communication by wire as the Government contends in the various counts of the indictment you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone conversation to constitute an interception under the statute and under the indictment must occur while the communication is being made upon the telephone system."

The additional explanatory language of the court merely points out that one meaning of "interception" is that the subject is prevented from reaching its intended destination and that that is not required here; that by

reason of the means of possible interception, such interception may occur "along the way" and not interfere with the progress of the message to its receivers.

Considering the court's language requiring interception before it reached its destination, while on the telephone system, the language of the court complained of by appellants on pages 108 and 109 of their Brief is properly limited. The language "during the progress of the conversation either through instrumentalities of electrical devices or through the human ear, it was heard by another party" must, considering the just-previous language, mean only "during the progress over the means of communication." Certainly, appellants could not seriously contend that listening without electrical or recording devices by means of a simple wire tap connection to the line between the conversants, for example, would not constitute interception. Such interception would be by human ear without electrical or recording devices.

Appellants, in seeking confusion, have confused the fair implication of the instruction as a whole.

Appellants attempt to discredit the tapes, themselves, as evidence of interception. Appellants invite the government to point out any evidence of interception and suggest that the tapes are equally consistent with the hypothesis that they were made by lawful means. The government welcomes examination and listening of the recordings by this court. They could only be consistent with recording by lawful means if the senders, or one of them, would know or be aware of the recording. Appel-

lants' argument ignores the contrary testimony of the parties to the conversations.

Appellants make much of the allegation that the recording device would be connected to lines intercepting the telephone lines of Maloney and suggest that the proof rests upon an inference upon an inference.

The hole in the wall is a circumstance from which reasonable jurors could find a line was used. The recordings require the use of a recording device. The recordings eloquently bespeak the fact of interception. The *unlawfulness* of the interception rests not upon inference but from the testimony of the parties to the conversations who had not consented thereto. A mechanical eavesdropping on a wire communication as it passes over the wire is, we submit, an evil Congress intended to proscribe. Auditing the evidence herein will show that the voices of both parties to the conversation were clearly recorded, often with room noise being excluded. Such would be extremely unlikely if what was being overheard and recorded was only the words of the speaker in a "bugged" room before they entered the telephone system on one end after leaving the telephone on the other end, as suggested by Appellants' Brief at page 107. Jurors are entitled to use reason. Numerous parties were involved in the recordings, concerning calls into or from the apartment of Maloney. On the state of the record, is the jury required to speculate, disregarding the suggestion of the note of *U.S. v. Hill, supra,* that the conversations were somehow miraculously recorded also at the other end of the conversations occurring, at the

office of the State District Attorney and his home, the office and home of the Assistant Liquor Administrator, the business of McLaughlin in Seattle, the home of Dorothea Anderson and elsewhere? Appellee submits not.

The indictment carefully avoided alleging that the lines connected to the recorder were physically attached to the telephone wires of Maloney, recognizing that by modern induction methods the messages on the wires in transit might well be intercepted absent direct connection therewith. Certainly Congress did not intend to make a new science of interception immune from the Act because no physical connection with the wires be necessary to accomplish the interference with the privacy of the means of communication sought to be protected. The fact of, not means of, interception was the proof required.

Appellants complain of the court's failure to give Elkins' requested Instructions 9 and 10. The court's instruction in different language covered the substance of these asked instructions. Considering the theory suggested by the footnote of *U.S. v. Hill, supra,* both the court's instructions and those submitted as Elkins' 9 and 10 required a finding more strictly in favor of the defendants than they were entitled to. Of this they cannot complain.

Appellee submits that appellant Clark's requested Instruction 9 is not germaine to the evidence and issues nor present science applicable thereto and the instruction would have been misleading. The court properly did not give such instruction.

Appellants urge that the happenstance of the court's use of the analogy of a football pass interception was error because in closing argument appellee's counsel had used an illustration also related to a football pass. This is so even though the court's use of the football analogy was to demonstrate that an intercepted message need not fail to reach its intended receiver, yet be intercepted under the statute, and was in different terms for a different illustration than the use made by the appellee. Appellee's use of the illustration was to suggest the possibilities of the footnote to the *Hill* case, *supra,* and intended to suggest that the emphasis should be on the interference with the means of the communication during its intended transmission, not restricted to the fallacy pointed up by the *Hill* case. Such divergent uses of an analogy are certainly not basis for error. If appellee misstated the law, it is certain that the jury was well-advised by all counsel and the court that the instructions of the court should guide their deliberations. No objection to the argument was made by appellants. The small excerpted portion of the argument printed is not basis for challenging counsel's argument, of which no other criticism has been made.

G. for new trial.

Appellants appear to have abandoned the denial of a new trial as error, except as based on the claimed error of the instruction re "interception" heretofore fully discussed (Point III-G). In any event, it is submitted that there was no error in the record, or circumstance entitling the appellants to a new trial.

H. in arrest of judgment.

In support of their claim that the court erred in overruling appellants' motion in arrest of judgment, appellants limit their argument (Spec. of Error No. 14) to asserting that the court had no jurisdiction because the indictment in some counts did not allege interstate communications. It appears to be settled law that intrastate messages are also protected. (See cases cited Point I herein). The evidence of this case from the witness Swank clearly established that Maloney's telephone was connected to an interstate system. It is not necessary for the indictment to negative possibilities that the line might be a private intrastate logging company telephone as suggested by appellants. The indictment as a whole could only be read as involving a usual telephone of the system with which we are all familiar in daily use.

Appellants' Dyer Act analogy (Appellants' Br. 126) is inapt. The statute, 18 USC § 2312, expressly requires the interstate transportation of a motor vehicle knowing that it has been stolen, as a necessary element of the crime.

IV. THE COURT PROPERLY COMPELLED TESTIMONY UNDER THE STATE COURT RESTRAINING ORDER.

This topic is fully discussed under Point III-A(2) herein.

V. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The government's evidence stood uncontradicted. It established that inter- and intrastate telephone conver-

sations to and from Maloney's apartment had been recorded, that Elkins had control of an adjoining apartment under incriminating circumstances, that Elkins and Clark had made statements (to the witness Erickson) connecting them with recordings of telephone conversations at the apartment in question; that the tapes were found at Clark's premises and Clark admitted to the witness Minielly, making the tapes for Elkins (Tr. 581-82). In the boxes of tapes were handwritten notes descriptive of parties to conversations in the handwriting of Clark. Maloney and other parties to the recorded conversations testified to identity of the telephone conversations and that they knew of no interception or recording and had not authorized use or divulgence by others thereof.

The recordings themselves spoke eloquently as evidence of "interception" of telephone messages. Finally, three witnesses testified to use and divulgence of the intercepted messages by Elkins.

The tapes were fully accounted for and the chain of evidence most complete despite efforts of appellants to discredit the chain. Their very contents attests their verity. They do not do particular credit to those whom the appellants infer would have had reason or opportunity to tamper with them, an unlikely event should testimony of those persons, in the face of the uncontroverted evidence of custody, be subject to doubt. The jury was entitled to evaluate the testimony and resolved it against the appellants. See *Davenport v. U.S.*, 9 Cir. #15689, 10/22/58.

VI. THE COURT'S INSTRUCTIONS WERE NOT ERRONEOUS.

See Point III-F herein. In addition, it is well to note that appellants contend the court erred in not giving a cautionary instruction concerning the chain of evidence.

Appellee commends to the court a reading of the voluminous transcript. Such a reading will demonstrate fully that there was nothing lacking in the established chain of evidence justifying a cautionary instruction relating thereto. The failure to give such instruction did not prejudice appellants.

VII. THE SENTENCES WERE LAWFUL AND SHOULD BE AFFIRMED.

In this connection, affirmance as to only a portion of the counts, as shown in Points II-A(1) and II-B(1), herein, will sustain the judgments.

VIII. APPELLANTS' SPECIFICATIONS OF ERROR.

No. 1(a)(b)(c)(d) and (e) are treated by Points I and II herein. No. 1(f) is covered by Point I herein.

No. 2 - 1 is treated by Appellee's Point III-A(6); Nos. 2 - 2, 2 - 3 and 2 - 4 by Point III-A(1); No. 2 - 5 by Point III-A(4), beginning at page 33 herein.

No. 3 is discussed under Point III-E herein.

Nos. 4, 5 and 6 are answered by Point III-F herein.

No. 7 is also answered by Point III-F herein, beginning at page 45.

Nos. 8 and 9 seem answered by Point III-F herein.

No. 10 is answered by Point III-F and III-G herein.

No. 11 is treated by Point III-F herein.

No. 12 is treated by Points III-A(2) and IV herein.

No. 13 is covered by the discussion in Points V and VI herein.

No. 14 is covered by Point III-H herein.

In addition to the points covered heretofore by appellee, appellants contend that the court erred in the form of verdict submitted to the jury. After a trial before a sealed jury consuming the weeks required for submission to the jury, it cannot be seriously asserted that the jury would not have written the appropriate "not" in the appropriate space as to any count or counts upon which they felt a particular defendant might be not guilty, but that the defendants would have had somehow greater protection from verdict forms in which the "not guilty" was already spelled out. Such a suggestion is an affront to those who serve our courts as jurors, sworn to well and truly find the facts in a given cause.

The form of verdict is within the discretion of the court. The form submitted was not complicated, and was proper. The court fully instructed the jury concerning the form submitted (Tr. 2524-25).

IX. COMMENT ON APPENDIX TO APPELLANTS' BRIEF.

Appellants have set forth in the Appendix their version of a thumbnail sketch of the testimony during the proceedings. Appellee respectfully submits that the editorializing and abbreviating inherent in such practice

makes the summary a poor substitute for the court's reading of the transcript and examination of the exhibits, even though the transcript is voluminous and the reading burdensome.

Appellee, however, believes it incumbent to obviate only some of the most apparent omissions or results of editorializing of significance in consideration of the evidence:

On the Motion to Suppress

Witness Wm. Langley: It should be added that the information upon which the search warrant affidavit was based concerned obscene pictures (Tr. 44, 45) and was from a police officer, which Langley thought was probable cause . . . that the affidavit set forth the source of the information (Tr. 47).

Witness Schrunk: Appellants' summary implies that the tapes were not in security at the sheriff's office. Actually they were in the safe the night of May 17 during the absence of the witness from his office (M.S. 102, Tr. 815).

Witness Sherk: The impression is left by appellants' summary that Sherk's affidavit for the federal process misstated his knowledge of the tapes being in the deposit box. Here the exact answer is important. Against a background of previous visual inspection and hearsay from those state police having access to the box, Sherk made an affidavit that he was positive the tapes were at the deposit box. He was asked (Tr. 297-98):

> "You did not know of your own knowledge that the articles which you subsequently seized under

> the warrant were in the box at the time that you made the affidavit; that is, of your own knowledge?"

And he answered:

> "In the sense in which you have phrased that question no affiant appearing before a United States Commissioner in the Courthouse here could know of their own knowledge that anything was located at a point distant from there."

Further, appellants misstate the government's position re the acquisition under the federal search. The government's position was not that the evidence was handed over "on a silver platter", but that had it been, the appellant would have been without standing to complain, and that the addition of process in acquisition from the bank did not give appellants greater standing to complain.

Counsel acknowledged that the FBI audit of the tapes was without any knowledge that the magistrate had requested them (Tr. 356).

On the Merits

Appellants, at page 165 of their Appendix, appear to criticize the government's not calling as a witness, Brad Williams, a reporter present when Clark's house was searched. He was equally available to appellants. See *Brown v. U.S.*, 9 Cir., #15845, 11/26/58.

Appellants' summary of the testimony of the witness Anderson confuses the playing of copies of the tapes with the evidentiary tapes (Tr. 1338-41, 1364). She also testified concerning delivery of the evidence tapes to Howlett and Minielly from the District Attorney's office (Tr. 1345).

The appellants' summary of Langley's testimony at page 189 concerning his testimony in Washington, D. C. overlooks the basis of the appellee's objection's being sustained by the court, which was that a refusal to answer on claim of privilege was not a "different" answer (Tr. 1603, 1607).

Mrs. Langley's testimony is summarized as indicating the tapes she heard had a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (Tr. 3439). The summary misstates the testimony, which was that she couldn't describe the sound but that it was a "ringing sound."

X. APPELLANTS' PARADOXICAL POSITION.

Of passing interest are the paradoxical facts of this case. *Olmstead v. U.S.,* 277 U.S. 438 (1928), by 5 to 4 decision, held evidence procured by wire tap admissible in federal court. Justice Brandeis, dissenting, treated wire tapping itself an unlawful search and seizure in contravention of the 4th Amendment. He said:

> "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping."

Justice Holmes in his dissent referred to wire tapping as "dirty business."

The Congressional answer to the *Olmstead* case was the statute making wire tapping a federal crime.

The appellants herein sought to suppress evidence of acts which four Justices of the Supreme Court at the time of the *Olmstead* decision condemned as an

illegal search and seizure on the basis that the acquisition by officials of the fruits of the wrongful acts was by unlawful search and seizure. Surely no case could be found better than the instant case to justify sustaining the "silver platter doctrine". This is not a situation which screams for reversal to protect constitutional freedoms. That the appellants themselves have violated the rights of others in a manner akin to that they rely upon to suppress evidence, does not entitle the government to disregard rights of the appellants, but according to the established doctrine of this circuit that was not done.

The government recognizes that human liberties are often forged in the affairs of not very nice people. Appellee does point out, however, that this is not a case which should justify reversal on the premise that hard cases make bad law—a premise which sometimes seems to justify departure from logic and precedent. To reverse the "silver platter doctrine" under these facts would be to impose hardship where none existed before.

CONCLUSION

Appellants have claimed errors in shotgun manner. The specifications of error have been fully discussed herein and the trial is submitted as without prejudice to the substantial rights of the appellants. A jury, after several weeks of trial (at which appellants rested at the close of the government's case), after reasonable deliberation of more than three hours, returned verdicts of guilty as to each defendant on each count

submitted to it. The evidence supports the jury's verdict. The court's rulings and the court's instructions as a whole were not erroneous. The appellants were entitled to a fair trial, but only one. They have had such trial. The judgment was well within authorized limits. The judgment as to Elkins should be affirmed, as should that against Clark.

Respectfully submitted,

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